BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CATHY D. MILLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,423
MOON'S IGA	)	
Respondent	)	
AND	)	
	)	
HAWKEYE-SECURITY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the September 24, 2007 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. Claimant was awarded benefits in the form of medical treatment with Lowry Jones, Jr., M.D., as the authorized treating physician for the purpose of providing an arthroscopic evaluation of claimant's right knee and repair of the knee, if required.

Claimant appeared by her attorney, James L. Wisler of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Thomas J. Walsh of Roeland Park, Kansas.

The Appeals Board (Board) adopts the same stipulations as the Administrative Law Judge (ALJ), and has considered the same record as did the ALJ, consisting of the transcript of the Deposition of Cathy D. Miller, taken on January 13, 2006; the transcript of Preliminary Hearing, held January 19, 2006, with attached exhibits; the transcript of Preliminary Hearing held August 3, 2006, with attached exhibits; the transcript of Preliminary Hearing held April 12, 2007, with attached exhibit; the transcript of Preliminary Hearing held September 24, 2007; and the documents filed of record in this matter.

ISSUES

1. Did claimant meet with personal injury by accident arising out of and in the course of her employment with respondent? Respondent

argues that claimant has had a long history of right knee problems. Respondent further argues the injury to claimant's right knee was the result of the normal activities of day-to-day living and the natural aging process and, thus, not compensable.

2. Respondent further raises to the Board the issue of whether claimant provided timely notice of her accident, pursuant to K.S.A. 44-520. However, a review of the September 24, 2007 preliminary hearing transcript fails to uncover a request by respondent to the ALJ regarding the issue of timely notice. The Board is limited under K.S.A. 44-555c to a review of disputes raised to and decided by the administrative law judge. Here, the issue of timely notice was neither raised to nor decided by the ALJ. Therefore, the Board does not have jurisdiction to consider that issue on appeal from this preliminary hearing order. Respondent's appeal on that issue will be dismissed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should be affirmed.

This matter first went to preliminary hearing on January 19, 2006. The ALJ issued a Preliminary Decision dated January 26, 2006, denying claimant benefits, after finding claimant's current right knee problems could not be distinguished from her preexisting right knee problems. No appeal was taken from that decision.

This matter next came before the ALJ at a preliminary hearing on August 3, 2006, with claimant again requesting medical treatment for the alleged injuries of October 15, 2005. The ALJ issued a Preliminary Decision on August 3, 2006, referring claimant for an independent medical examination (IME) with either Dr. Toby at the KU Medical Center or Dr. Shafer [*sic*] of Olathe, Kansas, for the purpose of determining the cause of and necessary treatment for claimant's right knee injury. This Decision was appealed to the Board. However, a Board Member determined that a referral for an IME concerning causation is an interlocutory order over which the Board does not have jurisdiction on appeal from a preliminary hearing decision. Respondent's appeal was, therefore, ruled premature and was dismissed.

The matter was next before the ALJ on April 12, 2007, with claimant again requesting medical treatment for her right knee injury. The April 24, 2007 Preliminary Decision issued from that hearing was appealed to the Board. In an Order rendered June 26, 2007, a Board Member ruled that the Decision contained no decision which could be reviewed. There was no justiciable controversy to consider and, therefore, the respondent's appeal of that Decision was dismissed. A letter issued May 3, 2007, by the

ALJ attempted to clarify the April 24 Decision. But, as there is no procedure in the Workers Compensation Act allowing an administrative law judge to render an explanatory letter supplementing an earlier decision, that letter was not considered by the Board Member issuing the June 26, 2007 Order.

This matter next came before the ALJ on September 24, 2007, with the claimant again requesting medical treatment for her right knee injury. The parties advised the ALJ that Dr. Jones had agreed to provide the IME earlier ordered by the ALJ. Claimant then requested that Dr. Jones be authorized to provide the treatment recommended in his report of January 4, 2007. The ALJ, in his Preliminary Decision issued September 24, 2007, granted claimant's request for the authorized medical treatment with Dr. Jones, including the arthroscopic evaluation and any repairs Dr. Jones deems necessary. Neither respondent's earlier-raised defense of a lack of timely notice nor claimant's earlier request for temporary total disability compensation was raised at the most recent preliminary hearing, nor were those issues addressed by the ALJ in the Decision of September 24, 2007. It is from that Decision that this appeal arises.

Claimant began working for respondent as a cook in its deli on October 11, 2005. Four days later, on October 15, 2005, while turning, claimant felt a pop in her right knee. Respondent has refused to provide medical treatment, arguing that claimant's knee condition preexisted her alleged injury with respondent. The record supports respondent's position in that claimant has had left knee problems for some time. Additionally, claimant was examined by Martin J. Schermoly, M.D., on October 14, 2005, the day before this alleged injury. The history presented to Dr. Schermoly indicated right knee problems for about 3 weeks. Claimant was diagnosed at that time with osteoarthritis of her knees.

Claimant was referred to the office of Everett James Wilkinson, Jr., D.O., by Dr. Schermoly, for an examination on October 18, 2005. On that date, claimant was examined by Dr. Wilkinson's physician's assistant, Amy L. Anderson. The history provided by claimant indicated a worsening of claimant's right knee problems immediately after the right knee accident with respondent, when claimant was standing and turning while "pivoting on the right knee".[1] An MRI of the right knee was recommended and ultimately performed on March 3, 2006. The MRI indicated degenerative signal changes of the posterior horn and body of the medial meniscus, but with no definite articular surface tear. Mild degenerative osteoarthritis and chondromalacia of the patellae was also displayed, as well as a popliteal cyst between the medial head of the gastrocnemius muscle and semimembranosus tendon. Claimant was diagnosed with a medial collateral ligament sprain.[2] Dr. Wilkinson examined claimant on April 25, 2006, at which time he scheduled her for surgery on April 27, 2006. The history of the work-related injury to claimant's right

[1] P.H. Trans. (Jan. 19, 2006), Cl. Ex. 1.

[2] P.H. Trans. (Aug. 3, 2006), Cl. Ex. 2.

knee remained the same. The dispute regarding causation continued, and the surgery was not authorized.

Claimant was ultimately, by agreement of the parties, referred to Dr. Jones for an IME on January 4, 2007. In the report generated from that examination, Dr. Jones determined that claimant suffered from a preexisting degenerative condition in her right knee which was aggravated by the work-related injury on October 15, 2005. He determined her primary pain appeared to come from the medial meniscus, with possible medial condylar articular changes. Dr. Jones recommended an arthroscopic evaluation and treatment.[3] Claimant requested that the recommended treatment by Dr. Jones be authorized, and the ALJ's Decision of September 24, 2007, grants that request.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[3] P.H. Trans. (April 12, 2007), Cl. Ex. 1.

[4] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 2005 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[7]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[8]

It is apparent, from this record, that claimant had preexisting problems with both of her knees. In fact, claimant underwent an examination the day before her alleged date of accident. The evidence also supports the determination by the ALJ that claimant aggravated that preexisting condition in her right knee when she twisted at work. Respondent argues, based on *Johnson*,[9] that claimant's condition is merely the result of the activities of day-to-day living and not compensable. In *Johnson*, the claimant was injured while simply standing from a chair. The Kansas Court of Appeals found that activity to be a normal activity of daily living. The Court, relying on *Martin*[10] and *Boeckmann*,[11] noted that an injury, even when it occurs at work, is not compensable unless it is "fairly traceable to the employment," as contrasted with hazards to which a worker "would have been equally exposed apart from the employment."[12]

Here, the injury occurred when claimant twisted her right knee while turning and while walking.

K.S.A. 2005 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the

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[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[9] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. ___ (2006).

[10] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[11] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[12] *Siebert v. Hoch*, 199 Kan. 299, Syl. ¶ 5, 428 P.2d 825 (1967).

> purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[13]

Injury or personal injury is defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[14]

Dr. Jones, in considering the method of injury here, determined that claimant, while standing and twisting, suffered an aggravation of her preexisting right knee condition. This Board Member finds that opinion to be persuasive that claimant suffered a compensable injury to her right knee which arose out of and in the course of her employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered an accidental injury which arose out of and in the course of her employment with respondent on October 15, 2005. The award of medical treatment by the ALJ should be affirmed. Respondent's request for review of the issue of timely notice is dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated September 24, 2007, should be, and is hereby, affirmed.

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[13] K.S.A. 2005 Supp. 44-508(d).

[14] K.S.A. 2005 Supp. 44-508(e).

[15] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of December, 2007.

BOARD MEMBER GARY M. KORTE

c: James L. Wisler, Attorney for Claimant
Thomas J. Walsh, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge